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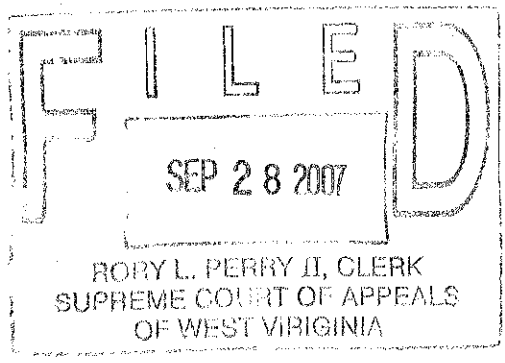
NO. 33050 505

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee

vs.

DAVID GABRIEL STAMM.

Appellant

BRIEF OF APPELLEE
STATE OF WEST VIRGINIA
IN RESPONSE TO
BRIEF OF APPELLANT ON BEHALF
OF DAVID GABRIEL STAMM

State of West Virginia,
By its Assistant Prosecuting Attorney
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CASES

STATE STATUTES

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal from a conviction for Failure to Pay Child Support and sentence of one to three (1-3) years in the penitentiary.

Procedural History

The Respondent incorporates the Petitioner's Procedural History and has no objection to how the Petitioner sets forth the Procedural History.

II. STATEMENT OF FACTS

Petitioner is accurate with the facts set forth in the Petition for Appeal. Respondent would, however, add the following facts:

During the trial, the mother of the child who Mr. Stamm was not supporting testified that the Petitioner, during their time together, had worked various jobs, but couldn't keep them. Further, the State, in its ***case in chief***, offered testimony concerning certain property the Petitioner had pawned, receiving income from the items, none of which went to the support of his child. The State did rebut the testimony of the defendant that he was injured and unable to find work through cross-examination of the defendant.

III. ASSIGNMENTS OF ERROR

1. WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR A JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF ALL OF THE EVIDENCE WHERE THE PETITIONER RAISED THE AFFIRMATIVE DEFENSE OF INABILITY

TO PAY AND PRESENTED TESTIMONIAL EVIDENCE REGARDING THE SAME, BUT THE STATE FAILED TO PRESENT ANY EVIDENCE SHOWING THE PETITIONER DID HAVE AN ABILITY TO PAY TO REBUT THE DEFENSE PRESENTED BY THE PETITIONER

2. WHETHER WEST VIRGINIA CODE 61-5-29 IS *PRIMA FACIE* UNCONSTITUTIONAL AS IT SHIFTS THE BURDEN OF PROOF OF A MATERIAL ELEMENT OF THE OFFENSE FROM THE STATE TO THE PETITIONER IN THE GUISE OF AN AFFIRMATIVE DEFENSE

   A. BY MAKING A DEFENDANT'S ALLEGED INABILITY TO PAY AVAILABLE ONLY AS AN AFFIRMATIVE DEFENSE, AFTER REASONABLE NOTICE TO THE STATE, WEST VIRGINIA CODE 61-5-29 IS UNCONSTITUTIONAL BECAUSE IS CREATES A *DE FACTO* PRESUMPTION OF AN ABILITY TO PAY IN FAVOR OF THE STATE AGAINST A DEFENDANT REGARDING A MATERIAL ELEMENT OF THE OFFENSE

   B. BY MAKING A DEFENDANT'S ALLEGED INABILITY TO PAY AVAILABLE ONLY AS AN AFFIRMATIVE DEFENSE, AFTER REASONABLE NOTICE TO THE STATE, WEST VIRGINIA CODE 61-5-29 IS UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT AS TO A MATERIAL ELEMENT OF THE OFFENSE

IV. ARGUMENT

1. WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR A JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF ALL OF THE EVIDENCE WHERE THE PETITIONER RAISED THE AFFIRMATIVE DEFENSE OF INABILITY TO PAY AND PRESENTED TESTIMONIAL EVIDENCE REGARDING THE SAME, BUT THE STATE FAILED TO PRESENT ANY EVIDENCE SHOWING THE PETITIONER DID HAVE AN ABILITY TO PAY TO REBUT THE DEFENSE PRESENTED BY THE PETITIONER

This Petition presents an almost identical issue as was raised in State of West Virginia vs Michael Lynn Nutter, Petition number 33003, which was not heard or decided due to the death of the petitioner in that matter.

The State had the burden of proving that the defendant persistently failed to meet an obligation to provide support to a minor which he can reasonably provide and which he knows he has a duty to provide to a minor by virtue of a court order and the failure results in 12 consecutive months without payment of support. West Virginia Code 61-5-29. Because the State's burden is so similar to the defendant's affirmative defense, the same evidence is presented on both issues.

In the State's case-in-chief, the State elicited the following evidence to meet its burden of proof: During the period between October 2004 and March 2006, a child support obligation in the amount of $167.52 per month was owed by the defendant (Tr. at 93 lines 1-11) for the support of a minor child who was the natural child of the defendant, namely Elias Gabriel Stamm, whose date of birth is August 15, 2000.(Tr. at 79 lines 3-9). The mother of the child testified that at the time of the establishment of the support obligation in February 2004, the defendant "had been doing construction work as self employed" (Tr. at 81 line 19); that the defendant had worked "at Shoney's for a brief amount of time. And he worked a telemarketing [job]... but holding down a job was one of our biggest issues".(Tr. at 83 lines 1-4). Testimony was elicited that absolutely no support was paid by the defendant during the time period in the indictment in this case. (Tr. at 83 lines 8-24) and (Tr. at 93 lines 19 & at 94 line 8). The State also elicited testimony from a pawn shop operator, Sheldon Dawkins, who testified that the defendant had pawned certain items during the period support was obligated but was not being made, including: on October 20, 2004 an SKS semi-automatic rifle for $100.00 (Tr. at 101 line 17 & at 103 line 17); on January 27, 2006, a .45 caliber semi-automatic pistol for $150.00 (Tr. at 103 lines 4-14), and a Dewalt router on August 16, 2005 for $40.00 (Tr. at 104 lines 1-14), all evidence of the defendant's ability to pay some support. Thus, the State did present evidence to make a *prima facia* case.

Whether or not the State elicited any "rebuttal" evidence is irrelevant, because the State presented its evidence of ability to reasonably provide support in its case-in-chief. Repeating the same evidence in rebuttal would not be permitted under the Rules of Evidence, Rule 403 "needless presentation of cumulative evidence". The State did, however, cross-examine the defendant concerning his DUI and how he was able to drive a vehicle and afford beer (Tr. at 130-135), why he never finished getting his GED (Tr. at 135, line 13-24), how he got to Virginia Beach and back-and-forth to West Virginia in a car, and had money for gas, and couldn't find work there for three months (Tr. at 138-139), what happened to his tools from his drywall business (which he quit operating because he wasn't making enough money (Tr. At 120 line 16 & 143 line 13))(Tr. at 139 line 20-& at 140 line 7), what happened to a .357 magnum handgun he owned and how he could afford ammo for the same (Tr. at 140-141 line 18), the fact that he lives with his mother (Tr. at 141 line 21), how he is not legally disabled (Tr. at 142 lines 10-16), how he pawned guns and received money from them (Tr. at 143 lines 15-24). How he used the money for his own use: "Yeah, I mean, if not, you'd starve to death, wouldn't you?" (T.R. at 143 lines 14-23). The evidence elicited through cross-examination, especially the fashion and demeanor in which the Petitioner testified, which was observed by the jury, tended to show that the Petitioner had the ability to reasonably provide support, but just chose not to. The evidence elicited through cross-examination could also be considered rebuttal evidence. Petitioner seems to imply that evidence can only be adduced through one's own witnesses, which is not the case.

Just like in State v. Nutter, Petition Number 33003, the jury heard both sides of the story, and chose to believe the State's version. Just like in Nutter, there was substantial evidence for which to sustain a conviction. Petitioner cannot sustain a directed verdict or motion for judgment of acquittal just because the jury chose not to believe his story. The standard is as follows:

"Upon motion to direct a verdict for the defendant, the evidence is to be viewed in then light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." State v. West, 153 W.Va. 325, 168 S.E.2d 716 (1969).' Syl. Pt. 1, State v. Fischer, 158 W.Va. 72, 211 S.E.2d 666 (1974)." Syl. Pt. 10, State v. Davis, 176 W.Va. 454, 345 S.E.2d 549 (1986). Syl. Pt. 1, State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001).

2. WHETHER WEST VIRGINIA CODE 61-5-29 IS *PRIMA FACIE* UNCONSTITUTIONAL AS IT SHIFTS THE BURDEN OF PROOF OF A MATERIAL ELEMENT OF THE OFFENSE FROM THE STATE TO THE PETITIONER IN THE GUISE OF AN AFFIRMATIVE DEFENSE

   A. BY MAKING A DEFENDANT'S ALLEGED INABILITY TO PAY AVAILABLE ONLY AS AN AFFIRMATIVE DEFENSE, AFTER REASONABLE NOTICE TO THE STATE, WEST VIRGINIA CODE 61-5-29 IS UNCONSTITUTIONAL BECAUSE IS CREATES A *DE FACTO* PRESUMPTION OF AN ABILITY TO PAY IN FAVOR OF THE STATE AGAINST A DEFENDANT REGARDING A MATERIAL ELEMENT OF THE OFFENSE

The statute does not create any presumption in favor of the State. The defendant still begins the trial (as instructed by the Court in its charge to the jury) with the presumption of innocence. The State still must prove the defendant can reasonably pay the support in its case-in-chief, or face a directed verdict/Rule 29(a) adverse ruling. Exerting the affirmative defense is the defendant's choice. He may choose not to put on any evidence and simply rely upon the State failing to meet its burden with the jury. However, if the defendant wishes to claim an inability to pay the support, he must back it up with sufficient evidence to shift the burden to the State. See State v. Daniel, 182 W.Va. 643, 653, 391 S.E.2d 90, 100 (1990) ("a court may properly require a defendant to present evidence which raises a reasonable doubt on the affirmative defense

asserted as long as the prosecution is required to prove each element of the crime charged beyond a reasonable doubt").

C. BY MAKING A DEFENDANT'S ALLEGED INABILITY TO PAY AVAILABLE ONLY AS AN AFFIRMATIVE DEFENSE, AFTER REASONABLE NOTICE TO THE STATE, WEST VIRGINIA CODE 61-5-29 IS UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT AS TO A MATERIAL ELEMENT OF THE OFFENSE

The previous asserted error is so similar to this one that argument may seem to be redundant. Again, the Defendant merely has an affirmative defense created by statute, which the State believes has long been recognized as a burden shifting defense. If the Defendant chooses to assert his affirmative defense, he must affirmatively raise it and present enough evidence to submit the same to the jury. He is by no means required to assert any defense, however, like other defenses, such as alibi, mistake, mental incapacity, etc..., he must present evidence before the jury can consider the defense. He may simply rely on the State failing to make a *prima facia* case. In the present case, the State did make a *prima facia* case, which simultaneously rebutted the defendant's affirmative defense. In addition, cross-examination of the Defendant further rebutted his own defense.

This Court has recognized "burden shifting" defenses, like insanity, (See Edwards v. Leverette, 258 S.E.2d 436 (W.Va. 1979)). Cleckley's Handbook on West Virginia Criminal Procedure, Second Edition, states at II-107:

> "the allocution of the burden of proving insanity on the defendant has little, if any constitutional implications....the Court stated [in Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L. Ed. 1302 (1952)] that there was no constitutional requirement that "mental responsibility" be proved beyond a reasonable doubt."

Further:

> As a general matter, our cases have permitted the burden or persuasion to shift to the defendant when the defendant alleges an affirmative defense. See, e.g., Skaggs v. Elk Run Coal Co., Inc, 198 W.Va. 51, 479 S.E.2d 561 (1996)(undue hardship is an affirmative defense, upon which the defendant bears the burden of persuasion); Voorhees v. Guyan Machinery Co., 191 W.Va. 450, 446 S.E.2d 672 (1994)(the defense of mitigation of damages is an affirmative defense in which the burden of persuasion lies upon the defendant); State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990)(burden of persuasion may be imposed on a defendant asserting the affirmative defense of self-defense or accidental killing); Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981)(burden of proof shifts to defendant on issue of contributory negligence).

The State had a burden to prove the defendant can "reasonably provide" support, should the State have failed to meet that burden, the Court could have directed a verdict. In this case, the Court found that the State had met its burden and had made a *prima facia* case. The Trial Court properly denied the Petitioner's Motion for directed verdict. The Defendant then chose to put on evidence in the form of his affirmative defense. The State did not offer any specific rebuttal evidence, but instead cross-examined the defendant, focusing on proving his credibility was suspect, and questioning him about certain property he had pawned and received money for during the time he was obligated to make support. Further the jury was able to observe the defendant in person, who presented as able bodied, i.e. he was not disabled, invalid, etc...and his demeanor, which this counsel would characterize as nonchalant. The Court, noting at his sentencing that he had testified at trial that he needed a cane for assistance when it rained, and the day of sentencing, it had been raining all day, stated:

> "Now, Mr. Hall, I want the order in this case to specifically set forth the reasons as to why the Court did not grant probation in this particular case. I should also indicate that Mr. Stamm had testified during the trial of this case that he attempted to use the excuse of his injury that he had as to why he wasn't able to work and the jury didn't buy that argument. The Court's not going to buy that argument now when it comes to sentencing in this particular case. Mr. Cain—or Mr. Stamm, do you have you cane with you today?

THE DEFENDANT: No.

> THE COURT: Well, the record should also reflect that it's been pouring down the rain here today and Mr. Stamm testified in front of the jury that part of the reason as to why he couldn't work was on days when it rained, he still needed to use a cane. Unless he's made some miraculous recovery, the Court also recalls that testimony from him and he doesn't have his cane with him today and it's pouring down the rain so I think this has all just been a big game...." (T.R. 7/28/06 at page 41,42 (sentencing hearing)).

The Court accurately identified that the jury simply didn't buy Mr. Stamm's arguments. The Defendant didn't bring his cane to trial either.

There appears to be no requirement that the State must prove the defendant "able bodied" to able to pay. However, by the issuance of an Order creating the support obligation, a finding of fact has already been made finding the Defendant able to pay the support at the time of the Order. However, just because someone isn't presently working or even isn't able bodied doesn't mean he doesn't have "stuff" he can sell or pawn to get money to provide support, which was proven by the State.

Finally, the Court below instructed the jury on the affirmative defense:

> "the Court instructs the jury that where a person is charged with and on trial for an offense of failure to meet an obligation to provide support to a minor, and that person offers in his defense evidence for the purpose of providing that he lacked the ability to reasonably provide the support at the time the offense is alleged to have been committed, such a defense in law is called inability to pay. The Court instructs the jury that where the accused relies upon an inability to pay in his defense, the jury should consider such evidence. If the evidence of inability to pay creates a reasonable doubt in the minds of the jury whether the accused could reasonably provide the support obligation at the time alleged in the indictment, then the jury must return a verdict of not guilty." (Tr. at 154 line 19 to p. 155.)

The instruction was delivered in a fashion that the jury was not even made aware that the burden of proof might be shifted to the defendant.

CONCLUSION/RELIEF PRAYED FOR

The State requests this Court deny Petitioner's Appeal for the reasons set forth above.

Respectfully submitted,
STATE OF WEST VIRGINIA,
By counsel,

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CERTIFICATE OF SERVICE

I, Kurt W. Hall, do hereby certify that a copy of the above Brief on Behalf of Appellee was hand delivered, this the 26th day of September, 2007, to Appellant's counsel at her address of:

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KURT W. HALL, Esq.